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No. 03-1192

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

STAWSKI DISTRIBUTING CO., INC.,

Petitioner,

v.

BROWARY ZYWIEC S.A., doing business as Zywiec Breweries, LLC,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Respondent objects to the question presented in the Petition as nonconforming to Rule 14(1)(a). Respondent submits the following:

Whether the Federal Arbitration Act and New York Convention preempt an Illinois state law limiting arbitration of disputes between brewers and wholesalers.

STATEMENT PURSUANT TO RULE 29.6

Zywiec Browary S.A. makes the following disclosures:

a) Zywiec Browary S.A. is publicly traded on the Warsaw Stock Exchange.

b) Heineken International B.V., seated in Amsterdam owns 61.78% of the stock of Zywiec Browary S.A. and is publicly traded on the Luxembourg Bourse, Euronext Amsterdam and Euronext Brussels.

c) Harbin B.V. owns 30.82% of the stock of Zywiec Browary S.A. and is not publicly traded.

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STATEMENT OF THE CASE

The Petition filed by Stawski Distributing Co. misstates and misrepresents the facts, the opinion of the Seventh Circuit, and opinions of this Court, and should be denied. As set forth below, the very first factual statement contained in the Petition is misleading. More importantly, the Seventh Circuit followed and applied the controlling authority of this Court, including the most recent opinion on the relevant issue, being *44 Liquormart Inc. v. Rhode Island,* 517 U.S. 484 (1996), an opinion that Petitioner tellingly fails to cite, let alone to discuss. Indeed, the Seventh Circuit examined the offending state statutory section, which is contained in protectionist legislation, and found that it violates not only the Federal Arbitration Act, but also the New York Convention. The Seventh Circuit then examined whether the Twenty-first Amendment, U.S. CONST. amend. XXI, § 2, saved the statutory section, and held that the offending section was "some distance from the language of § 2 [of the Twenty-first Amendment]". The Seventh Circuit properly reversed the District Court. Despite Petitioner's efforts to mislead this Court, the Seventh Circuit applied controlling Supreme Court authority, correctly applied that authority, and reached the correct conclusion. Therefore, Respondent respectfully requests this Honorable Court to deny the Petition.

Proceedings Below

Browary Zywiec S.A. ("Zywiec")[1], a Polish beer manufacturer, had a contractual relationship with Stawski Distributing Company, Inc. ("Stawski"), an importer and

1. Zywiec was improperly referred to in the caption of the Complaint as Zywiec Breweries LLC. Zywiec's corporate name is Browary Zywiec S.A.

master distributor of wine, spirits, beer and mineral water, for the importation and distribution of Zywiec beer products in seven states of the United States, including Illinois. Zywiec was dissatisfied with Stawski's performance, and terminated Stawski in accordance with the termination clause in the agreement. On December 2, 2002, Stawski filed a Complaint against Zywiec in United States District Court, Northern District of Illinois. Plaintiff's Complaint alleges claims of wrongful termination under the Illinois Beer Industry Fair Dealing Act, 815 IL. COMP. STAT. ANN. 720 (2003) (the "Act"), and under equitable and common law theories, as well as a breach of the Import Agreement between the parties. On February 19, 2003 Zywiec was served in Poland pursuant to the Hague Convention. Zywiec filed a Motion to Stay and Compel Arbitration on March 11, 2003. On April 10, 2003, Stawski filed a Cross-Motion to Stay Arbitration and in Opposition to Defendant's Motion to Proceedings and Compel Arbitration. Stawski argued that Section 9(b) of the Act invalidated the arbitration clause in the Import Agreement. On May 22, 2003, the District Court entered an Opinion and Order denying Zywiec's Motion to Stay and to Compel Arbitration, and granting Stawski's Cross-Motion to Stay Arbitration Proceedings, by enforcing the Act's anti-arbitration provision. (Memorandum Opinion and Order) (hereinafter "D. Ct. Op.").

On November 30, 2003, the Seventh Circuit Court of Appeals vacated the District Court's order to stay arbitration and remanded. (Seventh Circuit Opinion and Judgment, published as *Stawski Distrib. Co. v. Browary Zywiec S.A.*, 349 F.3d 1023 (2003)) (hereinafter "7th Cir. Op."). On December 11, 2003, the Seventh Circuit denied Petitioner's motion for rehearing *en banc*. In its petition to this Court, Petitioner asks for a review of the Seventh

Circuit's vacation of the Order to Stay Arbitration as contrary to established Supreme Court precedent addressing instances of conflict between state laws enacted pursuant to the Twenty-first Amendment and federal law or international treaty.

In the Court of Appeals, Petitioner argued that the anti-arbitration provisions are necessary to the Illinois Beer Industry Fair Dealing Act's alleged purpose of promoting long-term beer distributors, and as such, further Illinois' power under the Twenty-first Amendment. Petitioner urged the Court of Appeals to affirm the District Court's decision that the anti-arbitration provisions of the Illinois state law should prevail over conflicting federal law and treaty, because the Act as a whole was enacted pursuant to the Twenty-first Amendment, and therefore furthered a core concern within the exclusive power of Illinois.

Rejecting the District Court's opinion, and Petitioner's arguments in support, the Court of Appeals correctly found that the anti-arbitration provisions of the Illinois Beer Industry Fair Dealing Act were not within Illinois' Twenty-first Amendment powers, noting that the anti-arbitration provisions of the Act are "some distance from the language of Section 2, which does not relieve Illinois of its obligation to respect federal statutes and treaties, 'the Supreme Law of the Land.'" 7th Cir. Op. at 5. The Court of Appeals concluded that the Act's anti-arbitration provisions were not protected under the Twenty-first Amendment.

The Court of Appeals relied specifically on the analysis in this Court's precedents as stated in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980) (holding federal antitrust laws trumped California law resale price maintenance policies), and *Capital Cities Cable,*

Inc. v. Crisp, 467 U.S. 691 (1984) (holding the federal communications laws prevailed over an Oklahoma state law prohibiting certain liquor advertisements) and the Supremacy Clause (U.S. CONST. art. VI, cl. 2). The Court of Appeals concluded that Illinois could not use the cover of the Twenty-first Amendment to ignore the mandate of the Federal Arbitration Act. 9 U.S.C.A. §§ 1-16 (West 1999). The Seventh Circuit relied on and followed Supreme Court precedent in reaching that conclusion. The Court of Appeals also noted that had Illinois attempted to require all disputes arising out of the Act to be litigated in state court, the law would have similarly been preempted under federal law.

For the reasons stated herein, this Court should deny the petition for certiorari as lacking in merit.

COUNTER-STATEMENT OF FACTS

Contrary to Petitioner's assertion, from 1959 to 1992, Stawski contracted with the Polish Government to import Zywiec products into the United States. Stawski and Zywiec did not enter into their first contract with one another until 1992. That initial contract had a term of five years. At Stawski's initiative, just prior to expiration of the 1992 Agreement, Zywiec and Stawski negotiated the 1997 Import Agreement. The Import Agreement provided that either party could terminate at will by giving twelve months notice to the other party. Although Petitioner implies otherwise, the parties expressly agreed that any claims relating to the Agreement should be arbitrated in Poland. In particular, the Import Agreement states under the heading "Termination and Arbitration", "7.2 Any dispute arising out of this Agreement which can not be settled amicably between the parties shall be settled by the Arbitration Court of the Polish Chamber of

Foreign Trade in Warsaw. The parties undertake to execute its decision voluntarily." The Agreement also contained a choice of Polish law.

On July 10, 2002, Respondent notified Stawski in writing that the Import Agreement would be terminated, effective twelve months thereafter. The notice of termination was accompanied by a cover letter of the same date, which did in fact provide the specific reasons for the termination, despite Petitioner's claim that it did not. Although the termination comported with the parties' agreement as expressed in their Import Agreement — including the twelve month termination notice — Stawski now alleges that the termination violates the Illinois Beer Industry Fair Dealing Act.

The Act is an Illinois statute whose purpose is to restrict the ability of importers and brewers to terminate Illinois distributors. Petitioner asserts that the Act is a necessary component to the Illinois three-tier liquor distribution system, which is codified in the Illinois Liquor Control Act of 1934, 235 IL. COMP. STAT. ANN. 5 (2003). There is no basis for such an assertion by Petitioner. Petitioner's further assertion that approximately forty states have enacted statutes similar to the Act establishing a three-tier liquor distribution system and redressing imbalances between powerful brewers and their distributors is simply not true. While it may be true that forty states currently have a three-tier liquor distribution system (although Petitioner does not offer citations), a review of the law of the fifty states regarding the relationships between liquor distributors and liquor manufacturers reveals that only a handful have anti-arbitration provisions similar to the Act.

On October 1, 2003 Zywiec issued a second termination letter to Stawski which also complied with the Illinois Beer Industry Fair Dealing Act. Although the termination was to become effective on January 15, 2004, the termination was not implemented because the District Court entered an Order Granting Preliminary Injunction dated November 26, 2003 enjoining the parties to continue their course of performance under the Import Agreement.

Upon remand, Zywiec agreed to stipulate to the application of Illinois law in the Polish arbitration. Thereafter, on February 11, 2004, the District Court entered an Order Compelling Arbitration. The District ordered Stawski to file a claim for arbitration in Poland to arbitrate all disputes arising from either termination, or any other dispute under the Agreement. Stawski has done so.

SUMMARY OF REASONS FOR DENYING THE PETITION

This case involves the enforceability of an arbitration clause under the Federal Arbitration Act and New York Convention, 21 U.S.T. 2517 (1970), implemented by 9 U.S.C. §§ 201-08, in conflict with an Illinois state law which purports to regulate pursuant to the Twenty-first Amendment. Section 2 of the Twenty-first Amendment conveys upon states the power to regulate the transportation or importation of intoxicating liquors, and "permits the state to restrict imports without regard to the 'dormant commerce clause'". (7th Cir. Op., at 5). The Seventh Circuit, relying on this Court's decision in *44 Liquormart Inc. v. Rhode Island*,

517 U.S. 484 (1996),[2] and the balancing test articulated in *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324 (1964), and *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984), concluded that the anti-arbitration provisions were not within Illinois' powers under the Twenty-first Amendment and were therefore pre-empted by the Supremacy Clause of the Constitution. In doing so the Court of Appeals noted that the anti-arbitration provisions were "some distance" from the power reserved to states under § 2 of the Twenty-first Amendment.

Petitioner contends that certiorari of the Seventh Circuit's opinion is necessary because the Seventh Circuit decision conflicts with relevant decisions of this Court. *See* SUP. CT. R. 10(c). Throughout its Petition, Petitioner blatantly misrepresents the Seventh Circuit opinion to assert a conflict with Supreme Court precedent. There is no conflict. The Seventh Circuit explicitly followed Supreme Court precedent in rejecting Petitioner's argument that the anti-arbitration provisions of the Illinois Beer Industry Fair Dealing Act should pre-empt federal law and international treaty.

Petitioner would lead this Court to believe that the Seventh Circuit ruled that "state legislation passed under the grant of authority contained within the Twenty-first Amendment is *absolutely and always* subordinate to federal legislation pursuant to the Supremacy clause." The Seventh Circuit did nothing that extreme. It simply noted that, in the most recent instances that the issue has been presented, this

2. Despite the fact that the Seventh Circuit cites to *44 Liquormart*, and that it is this Court's most recent relevant authority on the subject, Stawski completely ignores *44 Liquormart* in its Petition.

Court has concluded that the federal law took precedence over the state law enacted pursuant to the Twenty-first Amendment.

Petitioner secondly contends that review is necessary because the Seventh Circuit relied on the Supremacy Clause in limiting the scope of the Twenty-first Amendment to a state's power to regulate liquor without concern of violating the dormant commerce clause. The Seventh Circuit was following Supreme Court precedent, in which this Court observed that "the Twenty-first Amendment does not in any way diminish the force of the Supremacy Clause", citing *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 516 (1996). Indeed, this Court also noted that: "the Twenty-first Amendment limits the effect of the dormant Commerce Clause on a State's regulatory power over the delivery or use of intoxicating beverages within its borders . . ." *Ibid.*

Finally, Petitioner asserts that the Seventh Circuit has failed to apply the balancing test as required under Supreme Court precedent. This Court has previously held in instances where there is a conflict between a state law directly implicated by the Twenty-first Amendment and a federal law or treaty, the Court must balance the competing laws. *Capital Cities*, 467 U.S. at 714. In this instance, the Court of Appeals concluded that the anti-arbitration provisions in question were clearly not within the state's power under the Twenty-first Amendment; therefore there was no need to engage in a detailed analysis of the purpose of the state law in conflict with the Federal Arbitration Act and international treaty.

Petitioner's blatant misrepresentation of the Seventh Circuit opinion robs the Petition of any intellectual merit. First, Petitioner repeatedly claims that the Seventh Circuit

held that the Federal Arbitration Act pre-empts Illinois' state liquor laws, when, in fact, the Court of Appeals determined that the Federal Arbitration Act pre-empted only the anti-arbitration provisions of the Act. Notably, Petitioner neglects to mention that the Court of Appeals also upheld the Act's requirement that Illinois law apply to any dispute arising between a brewer and its distributor. In addition, Petitioner submits to this Court a question which assumes that Illinois is exercising a core power under the Twenty-first Amendment, when, in fact, the Seventh Circuit decision rejects this very notion.

The Petition does not meet the standards justifying review on certiorari. SUP. CT. R. 10. The Petition should be denied.

ARGUMENT

I. THE PETITION FOR CERTIORARI SHOULD BE DENIED BECAUSE THE SEVENTH CIRCUIT'S HOLDING BELOW CORRECTLY INTERPRETS THE REACH OF § 2 OF THE TWENTY-FIRST AMENDMENT ACCORDING TO SUPREME COURT PRECEDENT.

A. State Law Enacted Pursuant To the Twenty-first Amendment Does Not Always Trump Federal Law To the Contrary.

The Seventh Circuit held that the arbitration limitation in the Illinois Beer Industry Fair Dealing Act was not within Illinois' power under the Twenty-first Amendment and therefore was pre-empted by the Federal Arbitration Act and international treaty. Contrary to Petitioner's contention, the

Seventh Circuit did not hold "state legislation passed under the grant of authority contained within the Twenty-first Amendment is absolutely and always subordinate to federal legislation pursuant to the Supremacy Clause." Petition, p. i. The Seventh Circuit recognized that the States do have broad powers under the Twenty-first Amendment: "The Twenty-first amendment gives states the power to restrict imports without regard to the dormant commerce clause." (7th Cir. Op. 5). *See also 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 516 (1996).

In asserting that the Court of Appeals applied "a per se rule against any state liquor regulation conflicting with federal policy" (Petition, p. 14), Petitioner grossly misrepresents the Court of Appeals' ruling. Petitioner turns on its head the Seventh Circuit's ruling — that State law enacted pursuant to the Twenty-first amendment *does not* always trump conflicting federal law. The Seventh Circuit properly concluded that the Twenty-first Amendment does not give states the power to disregard important federal laws in conflict with state laws regarding issues not directly related to the State's power to regulate liquor within its borders. This is consistent with this Court's decisions in recent years that state law indirectly related to the state's powers under the Twenty-first Amendment does not pre-empt federal law. *See California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.* 445 U.S. 97 (1980), with respect to the federal antitrust laws and a conflicting state law creating liquor pricing policies, and *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984), with respect to the federal telecommunications laws in conflict with a state law restarting liquor advertising.

The case of *North Dakota v. United States*, 495 U.S. 423 (1990), relied on by Petitioner, is no exception. In *North Dakota*, the state law was directly related to the state's power under the Twenty-first Amendment, and the federal law was only indirectly in conflict. Petitioner also relies on *In re G. Heileman*, 128 B.R. 876 (Bankr. S.D.N.Y. 1991), a New York Bankruptcy Court decision interpreting Oregon law, where the Court held that a bankruptcy code provision allowing discretion could be trumped by a state law prohibiting such discretion. Because the bankruptcy code statute in question was discretionary, it could be disregarded even in the absence of a contrary state law.

The Seventh Circuit ruling that it is not true that "the Twenty-first amendment allow[s] states to foreclose the application of federal statutes to the liquor business" is consistent with this Court's precedent, albeit contrary to the outcome Petitioner had hoped for.

B. Illinois Does Not Have the Power Under the Twenty-first Amendment to Disregard the Federal Arbitration Act and International Treaty.

The Seventh Circuit noted the routine with which arbitration agreements are now enforced under the Federal Arbitration Act. 7th Cir. Op. at 3-4. After considering the scope of Section 2 of the Twenty-first Amendment, the Court of Appeals rejected Stawski's argument that Illinois was acting to further the transport and import of liquor by limiting arbitration of claims between brewer and distributor. The Court of Appeals relied on this Court's prior decisions in concluding that the Federal Arbitration Act and an international treaty pre-empt Illinois' arbitration limitations under the Act.

The last time this issue was before this Court, the Court observed:

> Although the Twenty-first Amendment limits the effect of the dormant Commerce Clause on a State's regulatory power over the delivery or use of intoxicating beverages within its borders, "the Amendment does not license the States to ignore their obligations under other provisions of the Constitution." *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 712, 104 S.Ct. 2694, 2707, 81 L.Ed.2d 580 (1984). That general conclusion reflects our specific holdings that the Twenty-first Amendment does not in any way diminish the force of the Supremacy Clause, the Establishment Clause, or the Equal Protection Clause.

44 Liquormart, 517 U.S. at 516 (citations omitted). This quote is repeated almost verbatim by the Court of Appeals in support of its decision that the Supremacy Clause trumped Illinois' attempt to restrict arbitration in violation of the Federal Arbitration Act and international treaty. Petitioner ignores this decision, without even so much as a mention in its Petition.

The scope of the state's power pursuant to the Twenty-first Amendment to regulate liquor "without regard to the dormant commerce clause" does not allow Illinois to disregard Congress' exercise of its Commerce Clause powers. The Seventh Circuit rightly held that because the anti-arbitration provisions in the Illinois Beer Industry Fair Dealing Act are not sufficiently related to the "transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors,

in violation of the laws thereof," they do not prevail over the important federal policies embodied in the Federal Arbitration Act and the New York Convention, an international treaty. Contrary to Petitioner's assertions, the Seventh Circuit did not hold that Illinois' "liquor laws" were pre-empted by the Federal Arbitration Act and international treaty — only that the arbitration restriction contained in the Illinois Beer Industry Fair Dealing Act was pre-empted. Therefore, federal law which is supreme to state law in the absence of constitutional protection, must prevail.

C. The Seventh Circuit Followed the Analysis Established By the Supreme Court In Reaching Its Conclusion That the Anti-Arbitration Provisions Were Not Within Illinois' Core Power Under the Twenty-first Amendment.

Petitioner contends the Seventh Circuit's decision is fundamentally flawed because the Court, "[d]iscard[ed], without explanation, the balancing test established by this Court as the method for resolving potential conflicts between state enactments promulgated pursuant to the Twenty-first Amendment and federal law". As observed above, the Seventh Circuit closely followed this Court's most recent articulation of the standard of review, set forth in *44 Liquormart*. In addition, the Seventh Circuit did consider "whether the interests implicated by [the] state regulation are so closely related to the powers reserved by the Twenty-first Amendment that the regulation may prevail, notwithstanding that its requirements directly conflict with express federal policies," *Capital Cities Cable, Inc v. Crisp*, 467 U.S. at 714, when the Seventh Circuit concluded:

> Illinois has not set out to curtail beer imports from Poland; Stawski argues, to the contrary, that

> Illinois law *compels* a Polish brewer to continue providing it with supplies. That is some distance from the language of Section 2, which does not relieve Illinois of its obligation to respect federal statutes and treaties, "the supreme Law of the Land" (U.S. Const. art. VI, cl. 2).

7th Cir. Op. 5 (emphasis in original).

Because Illinois' arbitration limitation in the Act was "some distance" from the scope of Illinois' powers under the Twenty-first Amendment, and because the Court of Appeals had already observed the validity and importance of the Federal Arbitration Act and New York Convention, it was not necessary for the Seventh Circuit to engage in any additional analysis. The Court of Appeals applied the standard in *Capital Cities* when it held that because the arbitration limitation did not further a core power of Illinois under the Twenty-first Amendment, the limitation was not protected from pre-emption under the Supremacy Clause.

II. THE SEVENTH CIRCUIT DECISION FOLLOWED SUPREME COURT PRECEDENT THAT THE ARBITRATION CLAUSE IS SEPARABLE FROM THE CHOICE OF LAW CLAUSE.

A. The Forum Selection Clause and Choice-of-Law Clause are Separate.

The Seventh Circuit held that the "forum-selection clause [in the Import Agreement] is enforceable, even though its choice of law clause is not . . ." (7th Cir. Op. at 6). Petitioner contends that the cases relied on by the Seventh Circuit do not "support the view that forum selection and choice of law

provisions should be independently analyzed and enforced". Petitioner does not cite a single case in which any court has held that the issues of forum and substantive law were inseparable. Rather, Petitioner asserts that two Supreme Court decisions, *Mitsubishi* and *Scherk*, "merely recognized that statutory claims can be arbitrated", without regard to the choice of law provisions. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) and *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974). Contrary to Petitioner's assertion, both *Mitsubishi* and *Scherk* recognize that choice of law and choice of forum are separable. In its opinion in this case, the Seventh Circuit made it clear that as a general rule, the issues of forum and substantive law *can and must* be treated separately:

> Neither the Federal Arbitration Act nor the New York Convention provides any shelter for a choice-of-law agreement that otherwise would violate state rules forbidding parties to opt out of certain substantive norms. The Supreme Court made this clear in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 105 S. Ct. 3346, 87 L.Ed.2d 444 (1985), and *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 94 S. Ct. 2449, 41 L. Ed. 2d 270 (1974), its leading decisions on international arbitration of commercial disputes. The federal securities laws (the subject of *Scherk*) contain provisions forbidding the alteration of their rules by private agreement. 15 U.S.C. §§ 77n, 78cc(a). This led to the argument that arbitration could not be allowed, because either a choice-of-law clause or lack of familiarity with U.S. law might induce arbitrators hearing disputes in foreign lands not to apply our

> securities laws. The Justices concluded, however, that both domestic and international arbitration affects venue but not substance, and that a risk that arbitrators will not do their legal duty does not distinguish securities disputes from any others. The Court took the same approach to antitrust issues in *Mitsubishi*, holding that international arbitrators must apply U.S. law to transactions that could stifle competition in the United States, and that an opportunity to obtain judicial review under the New York Convention ensures that the panel will do so.

(7th Cir. Op. at 3.) Petitioner apparently agrees, as it acknowledges that "the decision as to choice of law ultimately resides with the arbitrator." Only if the choice of law and choice of forum are separable can the choice of law be left to the decision of the arbitrators.

Petitioner also asserts that "state statutes such as Illinois Beer Industry Fair Dealing Act providing for both forum and choice of law" rather than contractual agreements as to choice of law and choice of forum are the only way to ensure the certainty necessary to international transactions. This argument, however, conflicts with the specific language of the Supreme Court's opinions and the Seventh Circuit's rationale. First, ignoring a valid arbitration clause in an international agreement is certainly not the kind of consistency and predictability the Supreme Court had in mind. Instead, this Court has explained that predictability would be fostered by the consistent enforcement of valid arbitration clauses, the very position urged here by Respondent.

Second, applying the forum provision of a *state* statute to an international agreement that specifically provides for foreign arbitration provides no predictability whatsoever. The same foreign defendant could be dragged into a different forum, with different procedural rules, with respect to each contract it has with American parties, despite the fact that the parties had entered into valid arbitration agreements. The situation is made even more unpredictable because not all states have a comprehensive statute governing beer distributorships. Therefore, a foreign defendant could not know which agreements would be subject to state forum laws and which would not. This certainly does *not* foster predictability as Petitioner would have this Court believe. In fact, it does the opposite.

Petitioner essentially argues that under the Twenty-first Amendment, the public policy interest in enforcing the Illinois Beer Industry Fair Dealing Act outweighs the agreement to arbitrate. This argument attempts an end-run around the Supremacy Clause, the New York Convention, and the Federal Arbitration Act. The Seventh Circuit held that the Twenty-first Amendment does not allow the Act's forum provision to "trump" the Federal Arbitration Act and international treaty. The Supreme Court has also held that domestic public policy "considerations are not controlling in an international agreement." *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 16 (1972). It stands to reason that if the Act does not *directly* trump the federal and international laws requiring enforcement of an agreement to arbitrate, it cannot do so *indirectly* as a justification for finding the arbitration and choice-of-law clauses inseparable.

B. The Anti-Arbitration Provisions of the Illinois Beer Industry Fair Dealing Act Must Be Considered Separately from the Illinois Statutory Scheme for Liquor.

The Court of Appeals recognized that, in enacting the anti-arbitration provisions of the Illinois Beer Industry Fair Dealing Act, "Illinois has not set out to curtail beer imports from Poland". However, Petitioner argues that a "state liquor statutory scheme should be analyzed as a whole, not in its individual parts." The issue before the Seventh Circuit was whether *the arbitration clause* in the parties' Agreement should be enforced when in conflict with a state restriction on arbitration, not the entire Illinois three tier distribution system. The Seventh Circuit recognized the absurdity of viewing the Illinois regulatory scheme as whole when it noted:

> Suppose that Illinois had attempted to require all disputes arising out of the Beer Industry Fair Dealing Act to be litigated in state court. Could such a statute block Zywiec from removing to federal court under 28 U.S.C. § 1441(a), given the complete diversity of citizenship. Surely not. *Cf. Breuer v. Jim's Concrete of Brevard, Inc.*, 123 S. Ct. 1882 (2003). Yet a federal court would be a forum different from the one specified by Illinois law, just as arbitration occurs in a different forum. If removal under federal law is proper, then arbitration under federal law must be proper.

(7th Cir. Op. at 5-6).

Contrary to petitioner's assertion that entire acts must be examined, this Court has determined whether a state liquor regulation conflicts with federal law by examining the regulation in question, not the entire scheme of regulation. *See Bacchus Imports Ltd. v. Dias*, 468 U.S. 263, 275-6 (1984) (holding that the specific tax exemption under the Hawaii Liquor tax was not within a core concern of the Twenty-first Amendment because its purpose was to promote a local industry); *Kendall-Jackson Winery Ltd. v. Branson*, 82 F. Supp. 2d 844, 864-65 (N.D. Ill. 2000) (reviewing the specific discriminatory sections of the Illinois Wine Industry Fair Dealing Act in evaluating whether the Act was permissible under the dormant Commerce Clause); *see also Mt. Hood Beverage Company v. Constellation Brands, Inc.*, 63 P.3d 779, 789 (Wash. Sup. Ct. 2003) (holding that when a statute discriminates against interstate commerce in violation of the commerce clause, the discriminatory clause, not the statute as a whole, must be justified by core concerns of the Twenty-first Amendment in order to survive).

Petitioner's only support for its argument is *dicta* in *North Dakota v. United States*, 495 U.S. 423, 438-39 (1990), in which the Court recognizes that the regulations at issue were an important part of the state's regulatory scheme. However, the Court in *North Dakota* examined the purpose of the specific provisions, and the conflict between those provisions and the federal regulations, in reaching its conclusion that the actual conflict between the labeling and reporting requirements of state law were only indirectly in conflict with federal law, and therefore the Court let the state provision, which did further a core Twenty-first Amendment concern, stand.

C. The Parties Have Agreed to Apply the Illinois Beer Industry Fair Dealing Act in the Polish Arbitration.

Petitioner contends throughout its Petition that there is a potential harm in the Seventh Circuit's decision, in that it would "empower brewers to avoid state liquor regulations by compelling arbitration in foreign tribunals under foreign law." This is false. The Seventh Circuit considered the choice of law clause in the parties and concluded, without compunction, "[c]hoice of law is another matter altogether. Neither the Federal Arbitration Act nor the New York Convention provides any shelter for a choice of law agreement that otherwise would violate state rules forbidding parties to opt out of certain substantive norms." The Court went on to further state, "[t]he upshot is that the choice-of-law clause in the Stawski-Zywiec contract is *invalid* under Illinois law, which requires application of Illinois substantive law to Illinois distributorships." (7th Cir. Op. at 4) (emphasis added). Finally, the Seventh Circuit remanded this case to the District Court to consider whether choice of law may be separated from choice of forum based upon the Seventh Circuit's holding that "the contract's forum selection clause is enforceable, even though its choice of law clause is not." 7th Cir. Op. 6. Indeed, Stawski has now filed an arbitration claim in Poland.

CONCLUSION

Respondent respectfully requests that this Court deny the petition for a writ of certiorari.

Respectfully submitted,

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